No. 10266

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

La Verne Co-Operative Citrus Association, a corporation; Glendora Co-Operative Citrus Association, a corporation; Ventura Orange and Lemon Association, a corporation; Whittier Mutual Orange & Lemon Association, a corporation; Index Mutual Association, a corporation, and Chula Vista Mutual Lemon Association, a corporation, organized and existing under the laws of California.

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF.

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APPELLANTS' REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF.

The Government argues in its Supplemental Brief, I, that the separate defense in each answer does not state a valid defense, II, that the excluded evidence does not support appellants' claim of discrimination, IV, that the District Court followed the direction of the Act in excluding the proffered evidence. Under a separate heading, III, it discusses the applicable legal principles relating to appellants' claim of discrimination. In this brief we follow this order of discussion.

I.
Defendant's Pleadings.

The question is whether the separate defense states a valid defense. We think it does.[1]

But if the pleading is technically insufficient, appellants should be given an opportunity to amend:

(a) because no attack was made on the sufficiency of the pleading in the District Court;

(b) because the issues were tried (that is to say, stipulations of fact were admitted and other evidence excluded) on the theory that the issue was sufficiently pleaded.

Discussing rule 15 (b) of the Federal Rules of Civil Procedure, Professor Moore has this to say:[2]

> "Rule 15 (b) can be separated into two parts. First, if issues are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The same author also says:

> "At the trial, Rule 15 enables the case to be litigated on the merits. It does this in two ways:
>
> (a) in effect pleadings are automatically amended to conform to proof on issues tried by express or implied consent; (b) if objection is made to the trial of an issue not raised by the pleadings, an amendment is to be allowed to raise the issue, unless the

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[1]See *Brock v. Superior Court*, 12 Cal. (2d) 605, for a similar pleading upheld by the Supreme Court of California. This case is discussed on pages 11 to 13 of appellants' supplemental brief and is there referred to as practically on "all-fours" with the instant cases. It is not referred to in appellee's supplemental brief.

[2]Vol. 1, page 807, *Moore's Federal Practice* (1938); see, also, *Haskins v. Roseberry* (C. C. A. 9, 1941), 19 Fed. (2d) 803-805.

objecting party can show that he would be actually prejudiced, and even in that case the court may permit an amendment and grant a continuance, so that the objecting party can meet the new issue, and thus obviate the prejudice which he would suffer if obliged to litigate the issue at that time. The sporting element in litigation is eliminated."[3]

"Proper pleading" said Mr. Justice Black, speaking for the court in *Maty v. Grasselli Chemical Co.*, 303 U. S. 197, 210; 82 L. Ed. 745, 748, "is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment."

(c) For the purposes of the appeal this court should try the constitutional issue as though it were properly pleaded, assuming, of course, that the pleading is defective and that the defect is one which could be cured by amendment.[4]

(d) It has been held in the Second Circuit[5] that where the court recognizes that a cause of action (the same principle should apply to a defense) *might* exist, it should not have summarily dismissed the complaint, but should permit the action to go to trial with proper amendments, *even though no request to amend was made.* And the District Court for the Southern District of California (per Yankwich, J.) has held that a party should be denied relief "only when under the facts proved he is entitled to none."[6]

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[3]Vol. 1, page 786, *Moore's Federal Practice.*

[4]Vol. 1, p. 808, *Moore's Federal Practice; Gulf Smokeless Coal Co. v. Sutton, Steele & Steele* (C. C. A. 4, 1929), 35 Fed. (2d) 433, 439 and cases cited.

[5]*Downey v. Palmer* (C. C. A. 2, 1940), 114 Fed. (2d) 116.

[6]*Nester v. Western Union Telegraph Co.* (D. C. S. D., Cal., Cent. Div., 1938), 25 Fed. Supp. 478, 481.

What has been said is not to be taken as an admission that the pleading of the special defense is defective. To the contrary, we believe it raises the constitutional issue adequately as against an attack in the nature of a general demurrer. But should this court be of the opinion that the pleading is insufficient, then we are entitled to, and we request leave to, amend. This request we could not make in the trial court, not being there advised that the sufficiency of the answer was challenged.

Appellee correctly says (Appellee's Supp. Br. p. 6) that the discrimination is said to consist in placing green and tree-ripe lemons in one classification for the purpose of proration. Appellee insists that this is a matter peculiarly for legislative or administrative determination. With this we cannot agree. As pointed out in our Supplemental Brief (pages 7, 8), this court held in the *Hudson-Duncan* case[7] that price-fixing, when employed by Congress, as well as by the state legislatures, is gauged by the same standard as other regulations in the exercise of governmental powers, namely, the standard of reasonableness. Congress has recognized the standard of reasonableness and the standard of equitable apportionment of the crop among producers and handlers in Section 608 (c) (6) of the Act.[8] The vice is not in the Act, but in the Order. Appellee says (Appellee's Supp. Br. p. 6) that the separate defense does not "hint" of a failure to comply with the provisions of the Act and that we first make the contention in our Supplemental Brief. Granted. There for the first time, and by direction of this court, we were called upon to argue either the sufficiency of the pleading or of the proffered evidence. In the separate defense we

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[7]*Wallace v. Hudson-Duncan & Co.* (C. C. A. 9, 1938), 98 Fed. (2d) 985, 992-3.

[8]Section 608 (c) (6) (B) (C) and (D), Title 7, U. S. C., A.

pleaded the ultimate facts with respect to unreasonable and arbitrary discrimination. We have referred to the provisions of the Act in this respect only as showing that Congress has expressly recognized the standard of reasonableness and the standard of equitable apportionment required by the Constitution and referred to in the opinion of this court in the *Hudson-Duncan* case. Appellee does not deny the validity of the argument. It cannot deny it. Neither can it be said that the order provides "a uniform rule" or apportions quantities which may be marketed equitably among all producers or handlers as is required by the Act.

Appellee further asserts that "no facts are alleged to show that appellants are treated or affected differently from other handlers" (Appellee's Br. p. 5). We cannot agree. Co-operative marketing organizations (defendants among others) are merely instrumentalities of their producer members. Whatever injures the handler injures its members, and whatever injures some or any of its members injures it. There are handlers who have producer members producing tree-ripe lemons in quantities exceeding their production of greens. Take the testimony of Mr. Riesland, manager of defendant Chula Vista Lemon Association. About 15%, he said, of the lemons handled by his house are green, 22% silver and between 60% and 65% yellows (tree-ripe).[9] Among producers whose crops are very largely tree-ripes is R. C. Verity, who testified at the Promulgation Hearing that his family produced from slightly over 200 acres in Corona, and that about 50% of their lemons are tree-ripes.[10]

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[9]Page 562, transcript of testimony at promulgation hearing. This transcript was offered in evidence by the government and denied admission. [Rec. 152.]

[10]*Ibid.*, pages 650-1.

Mr. Nicholas, a producer in San Bernardino County, testified:

> "In our district our lemons get tree-ripe early in the spring, much earlier, in fact, than lemons in the coastal areas in the Northern counties, *so that we have no summer fruit available for shipment.*" (Emphasis added.)[11]

On the other hand, some handlers have less than 5% tree-ripes.[12] In 1939 American Fruit Growers, on its 144-acre lemon ranch at Corona, produced 47½% tree-ripes and only 9.32% green lemons.[13]

Now it is manifest that a handler, or producer, with 50% tree-ripes is not given an equitable apportionment of the total crop as against a handler, or producer, who has 5% tree-ripes, where, as is the case under the order, the life expectancy in storage is made the basis of allotments and tree-ripes have a storage life of approximately thirty days, whereas greens will keep in storage for as long as six months.

Appellee says (Appellee's Supp. Br. p. 5) that it appeared from the proffered evidence "that appellants intended to establish that they are so differently situated from other handlers that similar treatment amounted to discrimination against them." This statement is not correct. What appellants "intended to establish," and the proffered evidence tends to prove, is, that similar treatment of tree-ripe and green lemons is unreasonable, arbitrary and unjust. This for the reason that their widely variant keeping-qualities necessitate a differential permitting marketing of larger weekly quantities of tree-ripes,

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[11] *Ibid.*, page 859.

[12] *Ibid.*, page 553.

[13] *Ibid.*, pages 443-445.

as against a storage base, than is permitted for greens. In the absence of such differential, tree-ripes, although just as good in quality as greens, are discriminated against. It certainly needs no argument to prove that similar treatment of dissimilars is just as unreasonable and discriminatory as is dissimilar treatment of similars.

The fact, if it be a fact, that there are other handlers and producers in the same situation as defendants, or those of defendants handling large quantities of tree-ripes,[14] does not justify penalizing producers of tree-ripes and favoring producers of greens.

We have referred to this evidence in connection with our discussion of the validity of the separate defense because by offering the record of the promulgation hearing and by failing to interpose an appropriate motion or objection in the nature of a demurrer to the evidence, the government impliedly consented to the trial of the constitutional issues, thereby impliedly conceding the validity of the separate defense. In this connection the following from the opinion of Chief Justice Hughes for the court in *Borden's Farm Products Co. v. Baldwin*,[15] is pertinent:

> "We have frequently said, especially in confiscation cases, that a mere general allegation of repugnance to the Fourteenth Amendment is not enough to state a cause of action to restrain the enforcement of a statute or administrative order (citing cases). But in determining the sufficiency of the allegations of the complaint we cannot fail to take note of the nature and effect of the legislative action which is assailed."

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[14]Defendant Glendora Co-operative, for instance, handles approximately 50% to 60% tree-ripes and *light* silvers, which are practically the same as tree-ripes. *Ibid.*, pages 628-9.

[15]293 U. S. 191, 203; 79 L. Ed. 281, 285.

II.

Evidence.

Appellee asserts that only Chula Vista has attempted to show discrimination. We beg to differ. It is true that the printed record of the testimony does not show that other of the defendants handle a large percentage of tree-ripes, but there is evidence to that effect in the record of the promulgation hearing with respect to both Glendora Co-Operative and LaVerne Co-Operative.

Glendora Co-Operative handles 50% to 60% tree-ripes and *light* silvers, the latter being practically the same as tree-ripes.[16]

Of the lemons handled by LaVerne Co-Operative from January 15 to April 15, 1940, 79.46% were tree-ripes and *light* silvers; from April 15 to July 15, 60.93%.[17] After July 15 there are few tree-ripes in storage or in the market.

So far as the evidence shows the only defendant handling less than 50% tree-ripes and *light* silvers is the Ventura association.[18] Appellee is perhaps correct in saying that Chula Vista is the only defendant (shown) to handle a large percentage of *small* tree-ripes, but large or medium tree-ripes will not keep in storage any longer than small tree-ripes.

Appellee asserts (without any supporting evidence) that Mutual Orange Distributors and its member associations "reaped the benefits" of the voluntary proration adopted by California Fruit Growers Exchange, "without bearing any of its burdens." This charge has repeatedly been made and as often refuted. For instance, Mr. Teague,

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[16]Transcript of evidence at promulgation hearing, pages 628-629.

[17]*Ibid.*, page 612.

[18]*Ibid.*, page 553.

president of the Exchange, when asked at the promulgation hearing to assume that "the independents" have eliminated as much fruit as the Exchange, replied, "Well, you just can't make that assumption. They just don't do it."[19] But Mr. Teague also testified that for the past 15 years (prior to the year 1940) the producers marketing through the Exchange eliminated from fresh fruit channels an average of over 19%.[20] Again he testified, "We were only obliged to eliminate an average of about 20% over a period of some years."[21] Exhibit 26 at the promulgation hearing[22] shows that elimination by the associations marketing through Mutual Orange Distributors (including defendants) average 26% for the seasons 1934-5 to 1938-9 inclusive. How then, can it be said that "Mutual Orange Distributors and its member associations reaped the benefits of proration without bearing any of the burdens"? The inference is not as appellee would have it (Appellee's Supp. Br. p. 8), that the steady (*sic*) annual increase in the Mutual Orange Distributors' percentage of total lemon shipments[23] was in large part, or at all, due to any artificial advantage accruing to its members by reason of the voluntary prorate. Rather it may, indeed must, be inferred that the increase was due to Mutual Orange Distributors handling a larger percentage of the total crop. More producers marketed through it and fewer through the Exchange, or, putting it differently, it handled a larger percentage of the total crop.

Since the evidence at the promulgation hearing proves that Mutual Orange Distributors and its member associations eliminated at least as much as the Exchange houses,

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[19] *Ibid.*, page 413.

[20] *Ibid.*, pages 305-306.

[21] *Ibid.*, page 406.

[22] *Ibid.*, pages 1106 & 1108.

[23] Record 288.

the inference which appellee advances is both unjustifiable and gratuitous.

It is of interest to note that Mr. Teague also testified that if non-Exchange handlers eliminated the same percentage as the Exchange (the evidence shows that defendants eliminated a larger percentage) "there would be no need of a prorate."[24]

Appellee says, on page 9 of its Supplemental Brief, that nothing in the lemon order requires appellants to ship as fresh fruit, lemons which are not in condition for marketing. It is true that the order does not, in terms, require the shipment of lemons not in prime condition, but that is the natural effect of the order.

To illustrate: The peak of lemon production is in the (so-called) winter months. About 50 per cent of the entire season's production is picked during the four months of January, February, March and April. On the other hand, the greatest consuming demand is ordinarily from May first to the end of September. During the months of January to April, inclusive, the picks are ordinarily double the consumption. One of the functions of storage is to adjust the picks and hold lemons for the greater market demand.[25] Lemons normally sell at considerably higher prices from May 1st to September 30th than at other times.[26] Of the lemons sent to by-products all but about 5% are, or have been if they were properly handled, commercially marketable in fresh fruit channels. In other words, not to exceed 5% ordinarily would be cullage.[27] It is, naturally, the aim of every shipper to

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[24]Transcript of evidence at promulgation hearing, page 413.

[25]*Ibid.*, pages 161-162.

[26]*Ibid.*, page 162.

[27]*Ibid.*, page 197.

sell the largest percentage of lemons which it can during the times of highest prices, that is, from May 1st to September 30th.[28] The market for small-sized lemons in substantial quantities is limited to the months of April, May, June and July. The demand for 300's and 360's is more or less stable.[29] There is a great difference as between market areas as to the size which is customarily desired by the trade. Certain areas want all 300's and larger; others 360's and 432's; others want only 432's and 490's; and still others want even smaller.[30]

The man who can bring his lemons to a large size in a green condition has a distinct advantage over producers who cannot.[31] In what does this advantage consist? The answer is obvious. Manifestly it is to the advantage of handlers under prorate to keep their lemons in storage for as long as possible in order to increase the storage base against which allotments are made, and this applies to greens as well as to tree-ripes and silvers, but tree-ripes must be picked before they decay and must be shipped within shorter time after picking.[32] Since the weekly allotments make no distinction between lemons of diverse keeping qualities, it is but natural that tree-ripes (and silvers) should be held for as long as possible in storage in order to reduce the differential in allowable shipments, thus reducing by-products elimination. It follows that handlers having a large percentage of tree-ripes must either ship many of them after they have reached their prime, or not ship them at all.

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[28]*Ibid.*, pages 202-203.

[29]Record page 191.

[30]Transcript of evidence at promulgation hearing, pages 189-190.

[31]*Ibid.*, page 211.

[32]Mr. Powell, general manager of the Exchange, testified that 30 days is a better time to hold tree-ripes than any longer period; transcript of evidence at promulgation hearing, page 198.

Appellee (Appellee's Supp. Br. p. 13) asserts that the disadvantage resulting to producers of tree-tripes by reason of insufficient allotments to enable shipment of all of them during their comparatively short storage life "is merely a reflection of what they would suffer in a free market." Not only is there no evidence to support this assertion, but the reverse is true.

Appellee admits (Appellee's Supp. Br. p. 14) that peak picks of tree-ripes which occur early in the season must be moved to market without delay, but it says, "in a year of a heavy crop, vast (*sic*) quantities of these lemons would be shipped indiscriminately (*sic*) to an over-supplied market with what would necessarily be a devastating effect on prices." There are at least two answers to this much-to-be-deprecated disaster. First: There is not a shred of evidence to show that at any time in the past tree-ripes have been shipped in *vast* quantities, or that they have been shipped to an *over-supplied* market, or that they have been shipped *indiscriminately*, or that shipments of tree-ripes have had a *devastating* effect on prices. In short, the horrendous picture painted by appellee is made out of whole cloth. The second answer is that the government in conceding the disadvantage of tree-ripes, even in a free market, has reinforced our contention that Order No. 53 discriminates against producers and handlers of tree-ripes in favor of producers and handlers of greens. True, no packer handles tree-ripes or greens exclusively. But, to the extent that they handle a larger percentage of tree-ripes than other packers, they are discriminated against. Since, as appellee admits (Appellee's Supp. Br. p. 13), a longer period of time will elapse before greens deteriorate in storage than is the case with tree-ripes, the application of identical allotments to tree-ripes and greens permits handlers with a large percentage of greens in storage to ship—not only more lemons—but

more tree-ripes, against a storage base, than can be shipped by the handler with a large percentage of tree-ripes in storage. This is illustrated by the hypothetical example given on pages 19 and 20 of our Supplemental Brief.

Appellee says that this example is "wholly unrealistic" (Appellee's Supp. Br. p. 15). The example, of course, was merely illustrative. The criticism is hypocritical. In the first place, we are entitled to assume a storage life of six months for greens, because the prorate allotments are based upon the estimated storage life, not on the time when the lemons are in prime condition for marketing. Perhaps we should take a maximum of six weeks for tree-ripes, although their average life is nearer thirty days. If, however, we take one and a half months for tree-ripes as against six months for greens, the differential is but little less.

The counter hypothesis stated by appellee (Appellee's Supp. Br. p. 16) is of no value as an illustration, since it assumes that the five carloads of tree-ripes which serve as a storage base for allotments will themselves be shipped to the extent of three and three-fourths carloads. This is a false assumption, because if any part of the lemons constituting the storage base are shipped, the storage base is proportionately decreased. A handler cannot have lemons in storage to be counted as a base for allotment if he has already shipped them, and the storage count is made every two weeks.[33]

Let us take another example based on proffered evidence: Defendant Glendora Co-Operative handles 50% to 60% tree-ripes and light silvers, the latter being prac-

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[33]Record, page 40.

tically the same as tree-ripes.[34] Defendant Ventura Orange & Lemon Association handles less than 5%.[35] Both are defendants, but may nevertheless be taken as examples, the one of a district where the percentage of tree-ripes is large, the other where it is not. There is—there can be—no escape from the conclusion that the Ventura association can ship substantially more lemons as against an equal number of cars in storage than can Glendora. Even if we take the minimum advisable storage suggested by appellee (Note 9, Appellee's Supp. Br. p. 15) of three months. and the maximum advisable time which Mr. Powell of the Exchange gave for tree-ripes (30 days),[36] we have a result which is palpably unfair, for, as against an equal number of lemons in storage, the Ventura association has 95% of greens which are included in its bi-weekly count, and only 5% tree-ripes, whereas Glendora has 50% of each (counting light silvers as tree-ripes).[37] Under this example the Ventura association can ship 45% more lemons against its base than can Glendora Co-Operative.[38] If we use six months as the storage life for greens and 30 days for tree-ripes, the differential in favor of greens is better than 70%.

Appellee says (Appellee's Supp. Br. p. 18) that if a handler has a large proportion of tree-ripes and his allotments are too small to enable him to dispose of a substantial quantity during the peak period of demand, the borrowing provisions of the Order may be resorted to.[39] Also

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[34]Transcript of evidence, promulgation hearing, pages 628-629.

[35]*Ibid.*, page 553.

[36]*Ibid.*, page 198.

[37]While the testimony is that Glendora has 50% to 60% of tree-ripes and light silvers, we take the smaller percentage for purposes of this example.

[38]For convenience we count 4 weeks to a month.

[39]Order, Section 953.4(h).

that the provision for over-shipments[40] will offer some relief. These provisions furnish no relief or substantial relief. Under the borrowing section the borrower must pay back his borrowings during the same season. It is not to be supposed that the lender will accept in return for lemons loaned, lemons which are inferior or have a shorter storage life than those loaned. Hence, the borrower would merely borrow from Peter to pay Paul. Neither does a ten per cent, or one carload, overshipment in one week, which must be deducted from the following week's shipments, help any, as is self-evident.

If tree-ripes are borrowed (we are not here concerned with borrowings of greens), then the borrower must return tree-ripes and he has gained nothing, or he must return silvers or greens, in which event he is worse off than as though he had not borrowed at all. This thought was picturesquely stated by Mr. Nicholas, an Exchange grower, who testified at the Promulgation Hearing, as follows:

> "Now, there is provision, I am aware, for borrowing prorate, but from our experience in the Redlands-Highland house, it is awfully easy to borrow and it is practically impossible to pay back, when you have a prorate of a part of a car, don't even have a whole car to pay back, so it is worse than the man who gets into the hands of the loan sharks, because you just can't pay back what you borrow."[41]

Appellee says (Appellee's Supp. Br. p. 22):

> "What really hurts the appellants is that under proration they are compelled to bear a fair share of the burden of any annual surplus of lemons, *a load*

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[40]Order, Section 953.4(f).

[41]*Ibid.*, pages 861-862.

which has hitherto been carried by the members of the Exchange alone." (Emphasis added.)

This bit of special pleading for the Exchange would be understandable if it had been voiced by that organization, but its adoption by counsel for appellee is surprising in the face of profferred evidence hereinbefore referred to, proving it false.

Mutual Orange Distributors handles about 8% of the total lemon shipments [Record p. 160]. During the period from June 1 to November 1, 1941, while the Order was in effect, the industry shipped in interstate commerce 10,295.02 cars [Record p. 264]. Under the Order, Mutual Orange Distributors was permitted to ship during this period 505.63 cars, or 4.9% [Record p. 264]. During the corresponding period in the year 1940, it shipped in interstate commerce 615 cars out of a California total of 8217, or 7.48% [Record pp. 176, 289]. As a result of proration, therefore, the percentage of Mutual Orange Distributors as against total California shipments was 65% less. From June 1 to November 1, 1941, the industry shipped in interstate commerce 10,295 cars, while in the corresponding period of 1940 it shipped 8183 cars, or an increase of more than 25% [Record 257]; yet during the same period Mutual Orange Distributors was allowed to ship only 505.65 cars [Record p. 264] as against 615 cars in the corresponding period of 1940 [Record p. 289], or a reduction of 17.8%. The figures set forth on page 9 of Appellee's Supplemental Brief show that the 1940-1941 crop was about 50% higher than the 1939-1940 crop, but Chula Vista's stor-

age rose from an average of 6193 boxes for the period from 1935 to 1940 inclusive, as of September 1st, to 53,150 boxes on September 1, 1941, or almost nine times as much. Surely this result is inequitable, unreasonable and unnecessary.

The proffered evidence should be tested by the same rules that apply to a motion for a directed verdict or a judgment n.o.v. under Rule 50 of the Rules of Federal Procedure, or a motion for involuntary dismissal under Rule 41(b). This being so, all facts that the defendants' evidence reasonably *tends* to prove and all inferences that reasonably may be drawn therefrom must be resolved in favor of defendants. See, *Nielsen v. Richman* (C. C. A. 8–1940), 114 Fed. (2d) 343, and other cases cited in the appendix hereto.

Appellee discusses the evidence as though the cases were heard on the merits in the court below and findings made adverse to appellants. Had this been done, appellee would have been entitled to rely on the evidence which supported the findings and every reasonable inference to be drawn therefrom. The sole question here, however, is whether the proffered evidence tends to make a *prima facie* case. Contrary to the rule stated in the *Nielsen* case and other cases cited on this point in the appendix, appellee bases its argument largely on erroneous inferences *against* defendants.

We have pointed out some instances of false inferences in Appellee's Supplemental Brief. Space does not permit of our pointing out all. Concluding the discussion of the evidence, suffice it to say that other arguments advanced by appellee are either in answer to assumed contentions which we have not made, or are answered in our previous briefs.

III.

Applicable Legal Principles Relating to Appellants' Claim of Discrimination.

This point is covered in our Supplemental Brief and the Government advances nothing which requires further discussion.

On page 28 of Appellee's Supplemental Brief it is said: "The lemon order applies the equitable principle that all handlers shall share in the burden of any surplus lemon crop. It has sought to distribute that burden evenly." From what has been said under Points I and II herein, it clearly appears that the reverse is true. The lemon order does not apply the equitable principle referred to, and it has neither sought to, nor does it in fact, distribute the burden evenly.

IV.

The District Court Erred in Excluding Proffered Evidence.

Appellee refers to cases arising under the Emergency Price Control Act (Appellee's Supp. Br. p. 30 *et seq.*). In this connection see *Scripps-Howard Radio v. Federal Communications Commission,* from which we quote in the appendix. See, also, quotation in the appendix from the report of the Attorney General's Committee on Administrative Procedure (1941).

Appellee refers to the federal order regulating the handling of *oranges* (Appellee's Supp. Br. p. 29). While the orange order is generally similar to the lemon order, the method prescribed for arriving at allotments is dif-

ferent and there is no such discrimination under the orange order as exists with respect to lemons, because there are no problems as between tree-ripes and greens in the orange industry.

Assuming, without admitting, that difficult problems of administration would exist if a differential in lemons were allowed as between tree-ripes and greens, yet those difficulties, if in fact there are any, do not justify an unreasonable and inequitable order, or discrimination which deprives producers and handlers of tree-ripes of their property in violation of the Fifth Amendment. In this connection the following from the opinion of Chief Justice Hughes for the court, in *Borden's Farm Products Co. v. Baldwin,*[42] is in point:

> "Respondents' counsel, referring to the difficulties of price regulation, say that 'Apparently the fixing of prices by Government discovered as many troubles as were loosed from Pandora's box.' This complexity of problems, however, makes it the more imperative that the court in discharging its duty, in sustaining governmental authority within its sphere and in enforcing individual rights, shall not proceed upon false assumptions."

We find nothing further on this point in Appellee's Supplemental Brief which is not covered by our Supplemental Brief.

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[42]293 U. S. 194, 210-211; 55 S. Ct. 187; 79 L. Ed. 281-289.

Conclusion.

The judgments in these cases should be reversed and the cases remanded to the District Court with directions to take evidence and make findings of fact in accordance with Rule 52 of the Rules of Civil Procedure.

Respectfully submitted,

GUY RICHARDS CRUMP,

Attorney for Appellants.

APPENDIX.

All Facts That the Evidence Reasonably Tends to Prove and All Inferences That Reasonably May Be Drawn Therefrom Must Be Resolved in Favor of Defendants.

The test is the same as that involved on a motion for directed verdict, or a judgment n.o.v. under Rule 50 of the Federal Rules of Procedure, or a motion for involuntary dismissal under Rule 41 (b) of the same rules. This was expressly held with respect to a motion for directed verdict in *Nielsen v. Richman* (C. C. A. 8—1940), 114 Fed. (2d) 343, 345, where the court says:

> "All facts that the plaintiff's evidence reasonably *tends* to prove, and all inferences that reasonably may be drawn therefrom, must be resolved in her favor." (Emphasis added.)

The rule is the same upon a judgment n.o.v under Rule 50 of the Rules of Federal Procedure. In *Dickerson v. Franklin Nat. Ins. Co. of New York, N. Y.* (C. C. A. 4—1942), 130 Fed. (2d) 35, 37, the court said:

> "On motion for directed verdict this evidence was to be taken in the light most favorable to plaintiff and all conflicts were to be resolved in his favor. The motion for directed verdict on this ground was, therefore, properly denied; and the motion for judgment n. o. v. on the same ground stands in no better case. See Rule 50 (b) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F. (2d) 350."

See also:

> *Hornin v. Montgomery Ward & Co.* (C. C. A. 3), 120 Fed. (2d) 500, 502.

Upon a motion to dismiss under Rule 41 (b) of the Rules of Federal Procedure, the court stated in *Federal Deposit Ins. Corporation v. Mason* (C. C. A. 3), 115 Fed. (2d) 548, 551, that the court

> "must view the evidence and all inferences reasonably to be drawn therefrom in the light most favorable to the plaintiff."

To the same effect see:

> *Shaw v. Mo. Pac. R. Co.* (D. C. Western Dist. La., Monroe Div.), 36 Fed. Sup. 651.

The same rule obtains in California.

> *Mastrangelo v. West Side U. H. School Dist.*, 2 Cal. (2d) 540, 544,

where the court stated:

> "A non-suit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances."

To the same effect, see:

> *Archer v. City of Los Angeles*, 19 Cal. (2d) 19, 23;
>
> *Kersten v. Young*, 52 Cal. App. (2d) 1, 7;
>
> *Turner v. Lischner*, 52 Cal. App. (2d) 273, 278.

Additional Authorities on Point IV.

In *Scripps-Howard Radio v. Federal Communications Commission,* 316 U. S. 4, 16-17; 62 Sup. Ct. 875; 86 L. Ed. 1229, 1237-1238, Mr. Justice Frankfurter, speaking for the court, said:

> "Judged by its own terms, its history, and the practice under it, the Communications Act of 1934 affords no warrant for depriving the Court of Appeals of the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal challenging its validity. Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments. No such light is shed here. The numerous laws in which Congress has established administrative agencies for the exercise of its regulatory powers do not disclose any general legislative policy regarding the power to stay administrative orders pending review. Some statutes are wholly silent; some turn a court review into an automatic stay; some provide that the commencement of a suit shall not operate as a stay unless the court specifically so provides; some authorize the reviewing court to grant a stay where necessary. Significantly, the recent Emergency Price Control Act of (January 30) 1942 (56 Stat. at L. 23, chap. 26, 50 USCA Appx. Secs. 901 *et seq.*) explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders.
>
> The various enactments in which the staying power is made explicit, as well as the statutes that are silent about it, afford debating points but no reliable aids in construing the Act before us. One thing is clear. Where Congress wished to deprive the courts of this

historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.

We conclude that Congress by Sec. 402(b) of the Communications Act of 1934 has not deprived the Court of Appeals of the power to stay— a power as old as the judicial system of the nation. We do not of course go beyond the question put to us. We merely recognize the existence of the power to grant a stay. We are not concerned here with the criteria which should govern the Court in exercising that power. Nor do we in any way imply that a stay would or would not be warranted upon the showing made by the appellants in this case."

It will be noted that in this case the Supreme Court points out that the Emergency Price Control Act of 1942 explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders, and the court holds that in the absence of such explicit denial of power (86 L. Ed. 1234) as part of its traditional equipment for the administration of justice a Federal court can stay the enforcement of a judgment pending the outcome of an appeal. "The search for significance in the silence of Congress", the court says (86 L. E. at p. 1235) "is too often the pursuit of a mirage. * * * * denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

The *Scripps-Howard case* was before the Supreme Court on certificate from the United States Court of Ap-

peals for the District of Columbia for opinion on the question whether an order of the Federal Communications Commission could be stayed pending determination of an appeal therefrom. This case supports what was said on page 5 of Appellants' Reply Brief with respect to cases cited on page 16 of Appellee's Brief.

In its Report of Administrative Procedure in Government Agencies (Document No. 8, 77th Congress, First Session) the Attorney General's Committee on Administrative Procedure, in discussing enforcement proceedings, says that administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority. In other words, before enforcing an administrative order, it is essential that the court first determine that the order was within the scope of the agency's legal authority. We quote from page 82 of the report published by the United States Government Printing Office in 1941:

> "Statutes creating administrative tribunals generally provide methods by which their determination may be judicially reviewed. In this way, a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the Interstate Commerce Commission other than a suit by

the Commission to compel obedience. The same was true of the Federal Trade Commission Act until 1938 and is true today of the National Labor Relations Act. The statutes differ as to the weight to be attached to the administrative findings, the courts in which enforcement is to be sought and the process by which judicial aid is to be invoked. These matters will be discussed below. *The point here is that by this method, administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority.*" (Emphasis ours.)